IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No 475

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois; LATHAM CASTLE, Attorney General of the State of Illinois, and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Defendants-Appellants,

vs.

GEORGE W. DOUD, DONALD G. McDONALD and J. WESLEY CARLSON, [illegible] and EUGENE DERRICK,

Plaintiffs-Appellees.

[illegible]

APPELLANTS' REPLY BRIEF

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Printed by Authority of the State of Illinois

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Defendants-Appellants,

vs.

GEORGE W. DOUD, DONALD Q. McDONALD, and J. WESLEY CARLSON, doing business as Bondified Systems; and EUGENE DERRICK,

Plaintiffs-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' REPLY BRIEF

Appellees have now shifted the theory of their case.

Their amended complaint alleged that "plaintiffs * * * are forbidden to operate in the same manner as American Express Company" (R. 18), and prayed for a decree that the Currency Exchange Act was unconstitutional *in its application to them* because of the alleged discrimination (R. 23-24).

They contend in this Court that the statute arbitrarily selected between those exempted and *all others*, including appellees, engaged in the same business (appellees' brief, p. 11), between a person engaged in the business of selling or issuing American Express money orders, and one engaged in the business of selling or issuing *any other* money orders (appellees' brief, p. 2, 13) and that it is *not* a distinction between American Express and appellees that operates to deprive them of equal protection. (Appellees' brief, p. 13.).

This Court has steadfastly held that in order successfully to assail legislation as unconstitutionally discriminatory, the assailant must point to an actual, not a mere possible, invidious distinction drawn by the legislation.

Appellees have failed to demonstrate that either that they are or that anyone else is the victim of an unreasonable distinction enacted by the Illinois Currency Exchange Act.

Although appellees have failed to name a single person or firm comparably situated with American Express and the others exempted by the statute in question with relation to size and the other attributes referred to in our main brief (p. 18), it would be manifestly unfair to permit appellees to succeed in this litigation because of the speculative rights of unknown other persons or firms more comparably situated than appellees.

Appellees admit "the great size and power of American Express Company" (appellees' brief, p. 15); they admit "that there are differences between American Express Company and appellees" (appellees' brief, p. 13); they assert that

> "the District Court recognized that the American Express Company is one of high integrity and financial

responsibility, to quote its brief" (appellees' brief, pp. 14, 15a; but all these distinctions, obviously relevant to the legislative purpose of eradicating the sale of worthless money orders, failed to impress the court below as affording a rational basis for the distinction, because as stated by that court, the act "denies *one* one but American Express the opportunity to demonstrate financial responsibility or the adoption of adequate safeguards to protect the public."

Although the Illinois legislature concededly had the authority to regulate the business in which appellees engage, and the wisdom of employing any particular mode of regulation is a matter for legislative rather than judicial determination, *Carmichael Securities v. Matthews*, 90 F. Supp. 40, 45 (W. D. Wis. 1950), the court below in effect substituted its judgment for that of the Illinois legislature, and decided that appellees were entitled to the same legislative treatment as that accorded the banks, the Postal Department, the telegraph companies, and American Express; that appellees were in the same class; and that appellees merit the same trust and confidence of the people of Illinois as that enjoyed by those exempted.

Appellees pay lip service to *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78; and while admitting that the Illinois legislature could have made size and index for classification, they claim that "the name on the instrument sold, not size, is [sic] for the so-called classification" (appellees' brief, p. 15a). We fail to follow such sophistry.

If that name stood for high integrity and financial responsibility, as the lower court admittedly recognized and appellees repeatedly conceded, the same can not be said for appellees who are on the verge of insolvency, if not actually insolvent (our main brief, p. 13a), who have falsely represented that they operated under license granted them, that their money orders were "licensed" and "bonded",

and by a unified course of advertising that their business bore relationship to other independent money order businesses in other states with the same name who although they were required by their contract with Checks, Inc. dated August 9, 1953, to furnish operating and financial statements at least once a month (R. 137, 138), failed to have an audit completed even by the time of the trial more than a year later (R. 661); who although they were required by the same contract to capitalize Bondified Systems, Inc. at $40,000 "with not less than $40,000 *paid in*" (R. 160), never did so, but by agreement dated November 14, 1953 between themselves diverted $30,000 of their corporate stock subscriptions to the partnership (R. 171).

Appellees criticize the use of such terms as "diverted" and "siphoned." (Appellees' brief, p. 21). The money order purchasers in Indiana of the Bondified Corporation would certainly refer to the $30,000 transaction as a diversion, if they knew, after purchasing $1,140,000 of corporate money orders, (R. 52, 640), that there was only $38.10 in the corporate bank account. (R. 57, 61.)

Appellees ought not be heard to complain of "siphoned," because their counsel used that very word at the trial when he interrogated on direct examination Mr. Carlson, one of the appellees, as follows:

> "Q. After the partnership took over the corporation, with respect to the Indiana corporation, I believe you said that gradually the money was *siphoned* out of the corporation operating account into the partnership operating account, is that right?
>
> "A. That is right." (R. 47.)

Parenthetically, the partnership never took over the corporation. The partnership became the operating agent of the corporation in Indiana, but the money orders sold in that state were issued by and in the name of the corporation. (Pltfs'. Ex. 10, Reg. 95, 169, 170.)

Appellees seek to distinguish *Williams v. Baltimore*, 289 U. S. 36, by citing *Mayor, etc. v. The Monastery, etc.*, 166 Md. 281. The *Maryland* case was relied on by the Court of Appeals in 61 F. (2d) 374, 379, 381 (C. C. A. 4), but the latter decision was reversed in *Williams v. Baltimore*, 289 U. S. 36. The Maryland decision was distinguished by this Court at pp. 43, 45, 46, of its opinion.

Appellees point to the lower court findings that American Express was not licensed to transact business in Illinois; was not subject to Illinois regulation; did not require bonds of its agents; and may be able to avoid service of process in Illinois (appellees' brief, p. 15). American Express was not required to be licensed in Illinois, or to be regulated in that State, or to exact bonds from its agents, in order to be exempted from the Act in question. None of the bonds given or exacted by appellees were performance bonds protecting the public against non-payment of their money orders.

As to the service of process on American Express, we have shown in our main brief (p. 23) that American Express could be sued and served in Illinois as a *de facto* corporation. *Fitzpatrick v. Rutter*, 160 Ill. 282, 286; *Spading v. Drainmasters*, 232 Ill. App. 427, 429; *Damman v. Ins. Assn.*, 202 Ill. App. 308, 309. Since the passage of the revised Illinois Civil Practice Act, effective January 1, 1956, it can also be sued as a partnership in its firm name, and served personally in New York. Ill. Rev. Stat. 1955, chap. 110, pars. 13.4, 16, 17, 27.1. While American Express is not actually a partnership, an unincorporated joint stock association organized for profit, such as it is, is considered as a partnership in Illinois so far as the rights of third persons and liabilities of members to strangers are concerned. *Hossack v. Ottawa Develop. Ass'n.*, 244 Ill. 274, 291; *Hunter v. Winter*, 268 Ill. App. 487, 491.

We must confess frankly our inability to understand the distinction drawn by the Wisconsin federal court in 90 F. Supp. 40, 44, 45, and by the court below, that if appellees were engaged in a "complete" or "ordinary", currency exchange business, they could not complain of the exemption; but since they were engaged only in the money order business, they could complain thereof, "inasmuch as American Express was engaged in that very business." This distinction, it seems to us, subordinates substance to form; is irrelevant to the legislative purpose; impairs seriously the statutory protection intended to be afforded the people of Illinois; and rewrites the Currency Exchange Statute.

We do not consider that the secondary questions involved here (our main brief, pp. 24-28), have been adequately answered by appellees.

The decree of the court below should be reversed, or reversed and remanded with appropriate directions.

Respectfully submitted,

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